

CHAPTER 23 - JUDICIARY AND FUNDAMENTAL RIGHTS 7-8 September 2006

FUNDAMENTAL RIGHTS - GENERAL INTRODUCTION

- Important to recap how fundamental rights are protected in the Community system.

I. FUNDAMENTAL RIGHTS APPLICABLE AS GENERAL PRINCIPLES OF LAW

1. Jurisprudential construction

Fundamental rights did not feature in either the Treaties or any specific instrument at the outset. The 1957 Treaty of Rome provided for only a few specific personal rights and freedoms (the principle of non-discrimination on the basis of nationality, for instance). To avoid this situation leading the Member States to challenge the primacy of Community law, from 1969 the Court of Justice built up case-law that established a complete system of protection for fundamental rights¹.

According to this case-law, fundamental rights form an integral part of the general principles of law upheld by the Court. So, in the Community legal order fundamental rights -- as general principles of Community law -- are binding. In order to determine which fundamental rights form part of the general principles of Community law, the Court drew on several sources:

(i) European Convention on Human Rights

- The Court has consistently drawn on the provisions of international legal instruments concerning the protection of human rights on which the Member States have collaborated or to which they are signatories. The Court stated that the European Convention on Human Rights has particular significance in this respect². Since then a large number of judgments have referred to the Convention but reference is also made to the interpretation placed on it by the European Court of Human Rights³.

(ii) Other international instruments

- Apart from the European Convention on Human Rights, the Court has also referred to other instruments on fundamental rights to which Member States belong or with which they cooperate, for example the *International Covenant on Civil and Political Rights*⁴. Recently, in its judgment of 27 June 2006 on the Directive on family reunification, the Court referred for the first time to the *Convention on the Rights of the Child*⁵.

¹ Judgment of 12 November 1969, Case 26/69.

² Judgment of 21 September 1989, Hoechst AG, Cases 46/87 and 227/88.

³ For example, the judgments of 7 January 2004, C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P; 7 January 2004, K.B. v National Health Service Pensions Agency, C-117/01; 27 June 2006, Parliament v Council, C-540/03, paragraph 54.

⁴ Judgments of 18 October 1989, Orkem v Commission, Case 374/87, paragraph 31; 18 October 1990, Dzodzi, C-297/88 and C-197/89, paragraph 68; 17 February 1998, Grant, C-249/96, paragraph 44; 27 June 2006, Parliament v Council, C-540/03, paragraph 37. It also takes account, *inter alia*, of the European Social Charter and of ILO Conventions (judgment of 15 June 1978, Defrenne, Case 149/77).

⁵ Judgment of 27 June 2006, Parliament v Council, C-540/03, paragraph 57.

(iii) Common constitutional traditions

- This source of general principles of law can play an important role in giving a broader guarantee than that of the ECHR. For example, the Court has referred to common constitutional traditions to recognise an injured party's right to judicial appeal whereas Article 13 ECHR evokes only the right to appeal to a "national authority"⁶. Recently, the Court recognised that the principle of the retroactive application of the more lenient penalty forms part of the constitutional traditions common to the Member States⁷.

2. A dynamic approach

- An extremely detailed catalogue of case-law on rights and freedoms has been drawn up by the Court which will be examined in detail later. This catalogue is constantly being expanded and updated. For example, in May 2005 the Court for the first time imposed the retroactive application of more lenient criminal sanctions as a general principle of Community law to which a national judge must adhere when ruling on national legislation that transposes Community law⁸.

3. Case-law incorporated in Article 6(2) TEU

- This jurisprudential construction has been incorporated in the treaties; first, in the Single European Act of 1986 (third preamble), then in the Maastricht Treaty of 1992 (Article F.2 (6(2)) of the TEU) and, finally, in the Amsterdam Treaty of 1997. Article 6(2) TEU states that: *"The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."*

4. Scope confined to EU law

- Fundamental rights, as a general principle of law, are binding on the institutions of the European Communities in the exercise of their powers and on the Member States when they implement EU law. This applies, for example, when they apply a regulation, transpose a directive or implement a decision or a judgment of the Court of Justice of the European Communities⁹ or when they derogate from a freedom recognised by Community law within the limits it imposes¹⁰.
- Member States are thus bound by fundamental rights, as general principles of Community law, when a national case falls within the scope of the Community law. For the Court to be able to rule on fundamental rights, the issue under dispute must be connected with any of the situations contemplated by the provisions of the treaties¹¹.

⁶ Judgment of 15 May 1986, Johnston, Case 222/84.

⁷ Judgment of 3 May 2005, Berlusconi, C-387/02, paragraph 68.

⁸ Judgment of 3 May 2005, Berlusconi, C-387/02.

⁹ Judgments of 13 July 1989, Hubert Wachauf, and of 3 December 1992, O. Borelli SpA, C-97/91.

¹⁰ Judgments of 28 October 1975, Rutili, of 25 July 1991 and of 18 June 1991, ERT.

¹¹ Judgment of 29 May 1997, Kremzow, C-299/95, paragraph 15; Order of 6 October 2005, Vajnai, C-328/04.

- In this context, it is important to note that fundamental rights, as general principles of law, apply not only to the scope of Community law as such but also to areas covered by the third pillar. Indeed, in its judgment of 16 June 2005 (Pupino) concerning the framework decision on the standing of victims in criminal proceedings, the Court, referring to Article 6(2) TEU, stressed that this framework decision must be interpreted in such a way that fundamental rights are respected¹².

II. EU CHARTER OF FUNDAMENTAL RIGHTS

- The Charter was solemnly proclaimed by Parliament, the Council and the Commission in Nice on 7 December 2000. Its aim is to give European citizens a visible, detailed and predictable package of fundamental rights protected by the Union. Article 6(2) TEU confines itself to listing the sources of fundamental rights, without specifying their content.
- The Charter brings together existing rights hitherto scattered among several texts and not always easy to find. As the explanations in the Charter show, these texts include not only the ECHR but also international conventions of the Council of Europe, the United Nations and the ILO. Some rights are also derived from the European treaties themselves or stem from the ECJ's case-law.
- While the Charter itself is not a binding legal instrument, it brings together the fundamental principles which have become binding general principles of law following judgments of the Court.
- The Charter has enormous political importance because it expresses the common values at the heart of European democratic societies and ultimately constitutes the very identity of a Union in which citizens can recognise themselves. It also is of a legal importance since recently, in a judgment of 27 June 2006 on the "family reunification" Directive, the Court for the first time quoted and relied on the Charter in its arguments¹³.
- In operational terms, the Charter has also become an essential reference point for checking the compatibility of EU legislative instruments with fundamental rights. The Community legislator has developed a practice of inserting a recital in legislation to certify that the legislation in question complies with the Charter, prior checks being carried out first by the Commission but also by both branches of the legislature¹⁴. In April 2005 the Commission made such checks on compatibility with the Charter systematic by adopting a specific, transparent methodology based in particular on a detailed impact assessment of the fundamental rights aspect¹⁵.

¹² Judgment of 16 June, Maria Pupino, C-105/03, paragraph 59.

¹³ 27 June 2006, Parliament v Council, C-540/03, paragraph 57.

¹⁴ The Court recognised the importance of this recital in its judgment of 27 June 2006: "While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter." (paragraph 57).

¹⁵ Communication from the Commission: "Compliance with the Charter of Fundamental Rights in Commission legislative proposals: methodology for systematic and rigorous monitoring", COM(2005) 172.

III. ARTICLES 6(1) AND 7 TEU

- Apart from the fundamental rights recognised as a general principle of law, Articles 6(1) and 7 TEU also make provision for the requirement to uphold fundamental rights. Article 6(1) TEU draws up the list of the principles "common to the Member States" on which the EU is founded: *"the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law"*.
- Article 6 is accompanied by specific controls provided for in Article 7 TEU, which give EU institutions the means to ensure that all Member States uphold these common principles. These provisions apply in two cases: (i) where there is a *clear risk of a serious breach* by a Member State of the principles set out in Article 6(1) TEU; (ii) where there is a *serious and persistent breach* by a Member State of these same principles. The clear risk of a breach and the nature of the breach must constitute more than an individual case and must have developed into a systematic problem. Each decision to activate the procedure of Article 7 should be based on a legal and political evaluation of practical structural situations in each case.
- Here, unlike the fundamental rights falling under the heading of the general principles of law and the Charter, the applicability of Article 7 is not confined to the scope of EU law. The Union could therefore intervene by means of the procedure provided for in Article 7 not only where there is a breach of fundamental rights within that limited field but also in the event of a breach in an area where the Member States act autonomously.
- The Commission's policy on Article 7 was set out in a communication of 2003 which explains in particular the concept of "clear risk" and "serious and persistent breach"¹⁶.

CONCLUSION

- In practical terms, the EU Charter of Fundamental Rights will constitute a general reference point for screening in the area of fundamental rights. It is a comprehensive, up-to-date instrument as it incorporates rights and principles provided for in the ECHR and its protocols, plus other international, Community and specifically Member State sources.
- Of course, as we shall see, in some specific fields the screening will also be based on other Community instruments concerning specific fundamental rights, e.g. personal data protection, citizenship, racism and xenophobia, and procedural guarantees.

¹⁶ Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union - Respect for and promotion of the values on which the Union is based, COM(2003) 606.